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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JACK R. DUCKWORTH,
Petitioner,

vs.

RICHARD LEE OWEN II,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The Seventh Circuit erroneously held that jurors may impeach their verdict in Respondent Owen's case, a holding in direct conflict with that of the Supreme Court of Indiana.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Jack R. Duckworth, respectfully prays this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit), entered in cause number 79-2546 on December 22, 1980, which reversed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division (hereinafter District Court).

OPINIONS BELOW

The orders of the Seventh Circuit issued on November 7, 1980 and on December 22, 1980, have not been officially reported. Copies of said orders are appended hereto at pages A-1 and A-11. The December 6, 1979, opinion of the District Court has not been officially reported. A copy of said opinion is appended hereto at page A-17.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17.1(a) of the Rules of this Court, to review a decision of a federal court of appeals that has decided a federal question in a way in conflict with a state court of last resort.

The decision of the Seventh Circuit was entered on December 22, 1980. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

28 U.S.C. §2254 provides as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in

custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficieny of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such

part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Rule 606(b) of the Federal Rules of Evidence provides that:

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occuring during the course of the jury's deliberations or to the effect of anything upon his or any juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidivat or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rule 1101(e) provides that:

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of minor and petty offenses by the United States magistrates; review of

agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of procedures of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved

March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

STATEMENT OF THE CASE

This petition arises from the reversal, in part, by the Seventh Circuit of a decision by the District Court in the case of *Owen v. Duckworth*, Cause Number S79-98, whereby the District Court dismissed a petition for a writ of habeas corpus filed by Respondent Owen (Petitioner below).

Facts Material to the Consideration of the Questions Presented

Respondent, a prisoner at the Indiana State Prison, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, in the District Court alleging that his conviction in state court was unconstitutionally infirm for several reasons, including alleged juror misconduct which he contended violated his Sixth Amendment rights. Petitioner (Respondent below) filed his Response to Order to Show Cause on June 26, 1979. The District Court issued its Memorandum Opinion and Judgment dismissing this action on December 6, 1979. (See, Appendix page A-17). The Seventh Circuit affirmed the District Court, in part, in an unpublished order dated November 7, 1980, and ordered that oral argument be heard regarding Respondent's claim that he was denied a fair trial because of juror misconduct. The Seventh Circuit vacated the District Court's judgment on December 22, 1980, insofar as the District Court had denied habeas relief on this ground and remanded with instructions to conduct an evidentiary hearing.

REASONS FOR ALLOWANCE OF THE WRIT

THE SEVENTH CIRCUIT ERRONEOUSLY HELD THAT JURORS MAY IMPEACH THEIR VERDICT IN RESPONDENT OWEN'S CASE, A HOLDING IN DIRECT CONFLICT WITH THAT OF THE SUPREME COURT OF INDIANA

During the course of Respondent's criminal trial, Mary Tolley, one of the jurors, received an anonymous telephone call that she considered threatening. She reported this call to the trial judge who conducted an in camera hearing and determined that she was capable of rendering an impartial verdict. Respondent asserts that Mrs. Tolley subsequently told other jurors about this call, which constituted juror misconduct and introduced a prejudicial influence into the deliberations. The trial court heard direct testimony from one juror and testimony from the public defender's investigator who testified that he had spoken to the other jurors. The trial court refused to declare a mistrial based on these allegations.

The Supreme Court of Indiana held that Respondent was precluded from interrogating jurors and attempting to impeach the verdict by juror testimony as a matter of state law. *Owen v. State*, 269 Ind. 513, 381 N.E.2d 1235 (1978); *Wilson v. State*, 253 Ind. 585, 253 N.E.2d 817 (1970). Unless a state rule of evidence violates Respondent's federally protected rights, then federal courts are bound by state rules of evidence in habeas review. *Monk v. Blackburn*, 605 F.2d 837 (5th Cir. 1979), *cert. den.*, 100 S.Ct. 1326 (1980); *Wainwright v. LaRoche*, 599 F.2d 722 (5th Cir. 1979); *Hailey v. Dorsey*, 580 F.2d 112 (4th Cir. 1978), *cert. den.*, *Cotton v. Dorsey*, 440 U.S. 937, 99 S.Ct. 1282, 59 L.Ed.2d 495 (1979); *Butts v. Wainwright*, 575 F.2d 576 (5th Cir. 1978); *see also*, *Stone v. Powell*, 428 U.S. 476, 477 n.10, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Absent a constitutional commandment, rules of evidence in state criminal trials are a matter of state law and therefore questions to be determined solely by state courts. *Monk v. Blackburn*,

supra; Hailey v. Dorsey, supra; Silva v. Cox, 351 F.2d 61 (10th Cir. 1965); *Ratley v. Crouse*, 365 F.2d 321 (5th Cir. 1966).

The District Court found no constitutional error in the state court rulings or procedure (Appendix p. A-21). The Seventh Circuit held that Rule 1101(e) of the Federal Rules of Evidence provides that the Federal Rules of Evidence govern federal habeas proceedings and that "[c]onsequently the evidentiary problem in this case is governed by Rule 606(b) of the Federal Rules of Evidence and not the apparently contrary Indiana rule" (Appendix p. A-7). Rule 1101(e) provides in part that:

> (e) Rules applicable in part. In the following proceedings these rules (Federal Rules of Evidence) apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority...habeas corpus under sections 2241-2254 of title 28, United States Code....

Rule 606 of the Federal Rules of Evidence deals with competency of jurors as witnesses and provides that:

> (b) Inquiry into validity or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything upon his or any other juror s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The Federal Rules of Evidence were adopted by Congress for use in resolving evidentiary questions in hearings in federal courts. There is no question that Rule 1101(e) makes these rules applicable to evidentiary hearings which are held during federal review of state court convictions under 28 U.S.C. §2254. However, the question presented here is whether such an evidentiary hearing is required or whether the state evidentiary rule is controlling and precludes such a hearing. The Federal Rules of Evidence do not create substantive constitutional rights and are not the appropriate guideline to use in determining whether an evidentiary hearing is required in these circumstances.

Rule 606(b) of the Federal Rules of Evidence codified the evidentiary rule which had been accepted by the federal courts, and a few state courts, that a juror may testify as to whether extraneous material was brought to the attention of jurors. However, the federal case law prior to the adoption of Rule 606, and the notes of the advisory committee in dealing with this rule establish that the adoption of this Rule was based on a policy preference rather than on constitutional grounds. *McDonald v. Pless*, 206 F.2d 263 (4th Cir. 1913), 238 U.S. 264 (1915); *O'Grady v. Hiatt*, 52 F.Supp. 212, 213 (N.D. Tx. 1943). The notes of the advisory committee establish that the Rule was adopted as an accommodation between competing policy considerations. There is no mention of constitutional grounds in these notes, and the cases cited therein do not make the federal rule applicable in state courts as a matter of constitutional law. There also does not appear to be any decision of this Court that interprets the United States Constitution as requiring this evidentiary rule to be imposed on state courts.

Where a petitioner for habeas corpus relief under 28 U.S.C. §2254 was not denied any primary right safeguarded by the United States Constitution in state court proceedings, and where the state court has interpreted state law and procedure, that interpretation is conclusive on the federal

courts. *United States ex rel. Burnett v. People of State of Illinois*, 619 F.2d 668, 671 (7th Cir. 1980); *Monk v. Blackburn, supra; Miller v. Crouse*, 346 F.2d 301 (10th Cir. 1965); *United States ex rel. Scott v. Babb*, 100 F.2d 804 (7th Cir. 1952). Evidentiary hearings should only be conducted if a habeas petitioner's constitutional rights may have been violated in state criminal proceedings. Where no question of constitutional magnitude is raised evidentiary questions are controlled by state rules of evidence. *Monk v. Blackburn, supra.* In the absence of a constitutional question the doctrines of comity and federalism make it inappropriate to utilize federal rules of evidence to determine evidentiary issues in state courts.

The question then, properly framed, is whether the state court determination violated any of Respondent's constitutionally protected rights. Petitioner believes that the District Court was correct in finding that there was no constitutional error in the state court rulings and that further inquiry by the federal courts is foreclosed. The Sixth Amendment has traditionally not been interpreted as mandating state courts to require jurors to impeach their verdict where, as here, juror misconduct has been alleged but there is no corroborating evidence other than testimony of jurors or persons who are alleged to have received information from jurors.

Respondent alleges that a juror told other jurors about an anonymous "threatening" telephone call that she received. Respondent attempted to corroborate this allegation by juror testimony and the testimony of the public defender's investigator who said he spoke to some of the jurors. Respondent did not present any evidence of the alleged misconduct from any other source and never asserted the existence of such evidence.

Under these circumstances, the claim cannot be considered by the federal courts under 28 U.S.C. §2254 because of the traditional rule that "[f]ederal due process does not guarantee an accused the right to question jurors

about their thought process during their deliberation *or to question them about matters known only to them and not susceptible to outside corroboration by other evidence.*" (Emphasis added). *Procella v. Beto*, 319 F.Supp. 662, 668 (S.D. Tx. 1970);[1] *see also, Mattox v. United States*, 146 U.S. 140, 147-150, 13 S.Ct. 50, 36 L.Ed. 917 (1892); *Hyde v. United States*, 225 U.S. 347, 384, 32 S.Ct. 793, 56 L.Ed. 1114 (1912). In cases where federal courts assess claims of juror misconduct in state proceedings and state law or procedure does not permit jurors to impeach their own verdict, then juror testimony should be considered inadmissible "to prove matters exclusively within the knowledge of the jurors and which was not capable of corrobration by the testimony of witnesses or the introduction of evidence which did not originate with the jurors themselves." *Procella v. Beto, supra*, at 668-9; *see also, Hyde v. United States, supra.* This rule may not be applicable to cases arising in federal court because of the adoption of Rule 606(b), but these cases still state the requirements of the United States Constitution in such matters.

Thus, while the Federal Rules of Evidence, including Rule 606, are applicable to evidentiary hearings conducted under §2254, the Rules of Evidence do not apply in making the determination whether an evidentiary hearing is required. The appropriate standard in making this determination is whether the state's actions deprived Respondent of protected constitutional rights. Where such rights are not violated then state evidentiary decisions will not be disturbed.

Here Respondent's federally protected rights have not been infringed and the Seventh Circuit acted improperly in overruling the District Court and mandating an evidentiary hearing.

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[1] *Procella* dealt in part with allegations that the jury had considered matters which were not introduced into evidence during the trial in that a juror was alleged to have brought up the conviction and punishment of a co-defendant of Procella.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari to review the judgment and order of the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
(Argued: December 11, 1980)
December 22, 1980.

Before
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

RICHARD LEE OWEN, II, *Petitioner-Appellant,*	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 79-2546 vs.	)	
JACK DUCKWORTH, Warden, *Respondent-Appellee.*	)	No. S 79-98 Allen Sharp, *Judge.*

ORDER

Petitioner-appellant, Richard Lee Owen II, appeals from a judgment denying his petition for a writ of habeas corpus without a hearing. On November 7, 1980, in an unpublished order, this court affirmed in part, pursuant to Fed.R.App.P. 34(a) and Circuit Rule 14(f), but ordered that oral argument be heard regarding Owen's claim that he was denied a fair trial because of juror misconduct.[1] We now vacate the district court's judgment insofar as it denied habeas relief on this ground and remand with instructions to conduct an evidentiary hearing.

[1]The nature of Owen's offense, his sentence, and the procedural history of the case were set forth in this court's previous order and need not be repeated here.

During the course of the trial, juror Mary Tolley received an anonymous, threatening telephone call.[2] When this was brought to the trial judge's attention, he conducted an in-chambers examination of Tolley. The judge was satisfied that Tolley's judgment of the case would not be impaired by her receipt of the threat. Therefore, he allowed Tolley to continue, admonishing her not to reveal this matter to the other jurors.[3]

After the trial, Patrick McManama, a second-year law student working for the Public Defender, contacted ten of the twelve jurors by telephone. Of these ten, eight responded to a set of six questions regarding their knowledge of Tolley's receipt of a telephone threat during

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[2]The telephone threat was curious. Although Tolley was a juror and not a potential witness, the caller said: "God damn you, honky. You better not testify. We have a contract out on you. We are going to get you. We are going to get you." Nevertheless, Tolley took the call seriously and it scared her.

Although the caller did not identify himself, there is some basis in the record for inferring that Tolley may have suspected Owen's lay assistant, David Spencer, who sat with Owen at the defense table. During the in-chambers examination conducted by the trial judge after Tolley reported having received a threat, the trial court correctly stated to Tolley that there was no way to know whether the caller was someone acting on Owen's behalf or somebody trying to prejudice Tolley against Owen. After this, Tolley indicated that she was worried by the fact that Spencer smiled at her during the trial. Tolley had stated that the caller's voice sounded like that of a black man. When she indicated that Spencer was the source of her worry, Tolley identified him as "[t]he black man." In any event, like Owen, Spencer was incarcerated during the trial and it would have been difficult, at best, for him to have made the call to Tolley.

At this stage of the proceedings, we must assume that Spencer was not the caller subject, of course, to further proof to the contrary on remand. Also, hopefully on remand determinations as to whether Tolley did suspect Spencer and, if so, whether she so informed other jurors, can be made.

[3]Owen successfully requested a mistrial as a result of this incident. Also, by this time the alternate jurors who could have replaced Tolley had been utilized.

the trial.[4] The jurors' responses indicated that only Tolley was threatened directly. However, Tolley said that she told two jurors who were "holding out from the rest of the jury..." that she had received a threat, indicating that she told them during the deliberations.[5] Two jurors responded affirmatively and two negatively to the following question: "During the trial were you aware of anyone else receiving a threat or being contacted?"[6] The remaining jurors responded that "it was implied and that some of the jurors happened to mention it."

Partially, as a result of the McManama's investigation, Owen made a post-judgment motion to correct errors upon which a hearing was conducted.[7] McManama's hearing testimony related the results of his investigation, as described above. Ruth Yarger, a juror who had not responded to McManama's inquiry, also testified at the hearing. She testified that sometime before the jury deliberations began she became "vaguely aware" that one of the jurors had received a threatening phone call. Yarger also indicated that some of the other jurors became aware of this, stating that an extensive discussion of the threat did not occur "because we *as a jury* stopped it." Thus, including Yarger, at least three jurors were aware that a juror had received a threat during the trial, and possibly the entire jury was so aware.

Tolley submitted a medical excuse and did not testify at

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[4]Tolley was one of the eight jurors who responded to McManama's questions. However, Ruth Yarger, who testified at the hearing on Owen's post-judgment motion to correct errors, did not respond to those questions although she was contacted.

[5]The identity of these two jurors cannot be determined from the record.

[6]At the state court hearing, McManama was not permitted to identify which jurors had given a particular response. Thus, the record does not disclose whether the two affirmatively responding jurors were the two to whom Tolley had revealed her receipt of a threat. *See* note 5, *supra*.

[7]The complete motion raised numerous grounds for relief and consisted of sixty pages.

the hearing on Owen's post-judgment motion. At the time of the trial, Tolley was approximately sixty-eight years old and claimed that her physical and emotional condition prohibited her from testifying. The trial judge initially rejected as insufficient letters from two doctors.[8] However, when told that she would have to testify, Tolley approached "a state of hysteria." Consequently, the trial judge excused her. The judge initially granted, but ultimately denied, Owen's request to depose Tolley instead.[9]

II.

Owen maintains that the known facts coupled with those alleged raise a presumption of prejudice which at least entitles him to an evidentiary hearing, especially in the light of what he characterizes as an inadequate state court record.[10] On the other hand, the district court essentially held, and Duckworth maintains, that an evidentiary hearing would be improper because of the proscription against impeachment of a jury verdict through the use of the jurors' testimony and also that one was not required in

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[8]Ironically, one of Tolley's doctors had been a prosecution witness at trial.

[9]Owen made an offer of proof. He stated that Tolley would have testified that during the deliberations she discussed her receipt of a threat with the other jurors, particularly with two who were holding out. However, Owen did not speculate whether Tolley had attributed the threat to anyone acting on his behalf. As discussed in note 2 *supra*, this is a factual matter which should be resolved on remand, if possible.

[10]Alternatively, Owen argues that, through no fault of his, a substantial period of time has elapsed since the misconduct of which he complains, rendering a hearing inadequate protection of his federal rights and requiring the granting of his petition without further proceedings. However, the secondary position of this argument in Owen's main brief, its absence from his reply brief, and the fact that it was glossed over at oral argument, illustrate that it is not strenuously pressed. In any event, the better course is to remand for a hearing and to resolve the problem of witness unavailability which Owen speculates will arise if and when it is presented.

this case because the factual issues tendered by Owen were adequately litigated in the state court hearing on Owen's post-judgment motion. We find that Owen maybe able to prove facts which would entitled him to habeas relief by use of permissible means and that, through no fault of Owen's, the pertinent factual issues were not fully and adequately litigated in state court.

A.

> In a criminal case, any private communication, contact, or tampering, *directly or indirectly*, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.... The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229 (1954), *appeal after remand*, 348 U.S. 904 (1955), *appeal after subsequent remand*, 350 U.S. 377 (1956) (emphasis supplied and citations omitted).[11]

Accordingly, federal courts sometimes have ordered inquiries into allegations that extra-record facts or events potentially influenced jury verdicts, at least in cases such as this, in which the records revealed that the defendants (or

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[11]Duckworth maintains that Yarger's testimony that the jurors foreclosed extensive discussion of the threat renders this case similar to *Hinojos v. Black*, 462 F.2d 621 (9th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973) (per curiam), in which habeas relief was held to have been properly denied where two jurors allegedly "went outside the record." Although the *Hinojos* court did not elaborate, in its brief opinion it stated that there was a "full and complete post trial hearing in the court of conviction...." By contrast, in this case the petitioner's primary claim is that he was not afforded such a hearing. Thus, we disagree with Duckworth's implication that the Government has satisfied its burden of establishing that the error in this case, if any, was harmless.

petitioners) were not embarking on "fishing expeditions." *E.g., Remmer, supra; Sullivan v. Fogg*, 613 F.2d 465 (2d Cir. 1980); United States v. Howard, 506 F.2d 865 (5th Cir. 1975);[12] *Downey v. Peyton*, 451 F.2d 236 (4th Cir. 1971). Upon sufficient proof of such allegations, they either have reversed convictions or granted federal habeas relief. *E.G., Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam); *Remmer, supra; United States ex rel. Tobe v. Bensinger*, 492 F.2d 232 (7th Cir. 1974); *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *United States v. Rakes*, 74 F. Supp. 645 (E.D. Va. 1947); *Compare, Taylor v. Mabry*, 593 F.2d 318 (8th Cir. 1979) (per curiam) (alleged offending juror testified at hearing on state prisoner's habeas petition that he did not inform the other jurors of petitioner's criminal record of which he knew because he was a friend of petitioner's sister and brother-in-law). Consequently, Owen has made apparently well-founded allegations which entitle him, at least, to an opportunity to litigate them fully.

B.

The district court's decision not to conduct a hearing was based in part on the proscription against permitting jurors

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[12]Explaining the reasons for the court's reversal of the denial a motion for a new trial and its remand for a hearing to determine the accuracy of such allegations in *Howard*, Judge Goldberg remarked:

> The modern jury is conceived of as an institution that determines the merits of a case solely on the basis of the evidence developed before it in the adversary arena. As Justice Holmes observed in *Patterson v. Colorado*, 1907, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed 879, 881, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Accordingly, courts have been continually sensitive to the jeopardy to a criminal defendant's Sixth Amendment right posed by any jury exposure to facts collected outside of trial.

United States v. Howard, 506 F.2d at 866.

to impeach their own verdict. The Indiana Supreme Court's opinion in this case indicates that under Indiana law Owen was properly foreclosed from proving the occurrence of juror misconduct through the use of the jurors' testimony. *Owen v. State*, 269 Ind. 513, 381 N.E.2d 1235, 1241 (1978).[13] However, this Indiana evidentiary rule is inapplicable in a federal habeas proceeding. As Judge Friendly remarked even before the enactment of the Federal Rules of Evidence:

> [W]e would be obliged to disregard a state evidentiary rule preventing what in this case is the only method of proving that the defendant had been denied due process by the jury's consideration of prejudicial extra-record facts...We would reach the same result if the supposed...rule barring a juror's statement about improper statements within the jury room were viewed as being cast in terms of privilege.

United States ex rel. Owen v. McMann, 435 F.2d at 820 (citations and a footnote omitted).

After the promulgation of the Federal Rules of Evidence, the accuracy of Judge Friendly's dictum is unquestionable. Pursuant to Rule 1101(e), the Federal Rules of Evidence govern federal habeas proceedings. Consequently, the evidentiary problem in this case is governed by Rule 606(b) of the Federal Rules of Evidence and not the apparently contrary Indiana rule. *Smith v. Brewer*, 444 F. Supp. 482, 486 (S.D. Iowa), *aff'd*, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978); *See Generally* 10 *Moore's Federal Practice* §606.20[2].

Rule 606(b) provides:

> *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a

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[13]As Owen's counsel pointed out in oral argument, this conclusion of the Indiana Supreme Court is inconsistent with Duckworth's argument that Owen had a full and fair opportunity to litigate his claim in the state courts. *See* Part III C, *infra*.

> juror may not testify as to any matter of statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Fed R. Evid. 606(b).

Essentially, Rule 606(b) tracks the pre-existing case law, which embodied a flexible approach to the evidentiary problem to which the rule is addressed. *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 & n.22 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) (citing cases); *see generally* 3 *Weinstein's Evidence* ¶*'s 606[03], [04]; Advisory Committee Notes*, Fed. R. Evid. 606(b). Under federal law, post-verdict interrogation of jurors has been permitted in criminal cases: regarding "direct" outside influences upon the jury, such as a bailiff's comments,[14] pressure to convict imposed by the trial judge,[15] and the reading of newspapers in the jury room;[16] and regarding prejudicial matters communicated to the jury through one of its members;[17] but not regarding the jurors' mental

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[14] *Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam); *United States ex rel. Tobe v. Bensinger*, 492 F.2d 232 (7th Cir. 1974).

[15] *Government of Virgin Islands v. Gereau*, 523 F.2d 140.

[16] *Mattox v. United States*, 146 U.S. 140 (1892), *later appeal*, 156 U.S. 237 (1895).

[17] *United States ex rel. Owen v. McMann*, 435 F.2d at 820; *United States v. Rakes*, 74 F. Supp 645 (E.D. Va. 1947).

processes or their method of reaching a verdict.[18]

Obviously, there is no bright line between the permissible and the impermissible in this area. However, we conclude that federal law permits Owen to prove through the testimony of the jurors whether, when, and to what extent Tolley discussed her receipt of the threatening telephone call with the other jurors, and especially whether in so doing she attributed the call to the defendant or someone connected with him. Of course, when eliciting the jurors' testimony the parties and the trial court must scrupulously avoid any inquiry into impermissible matters. However, this has been achieved, in other cases[19] and there is no reason why it can not be done here.

C.

The district court held, and Duckworth maintains, that regardless of the evidentiary barrier discussed above, an evidentiary hearing was not required because the factual matters which Owen seeks to litigate were litigated adequately in state court, where Owen did not come forth with sufficient evidence to prove that prejudicial error had occurred. This conclusion, however, assumes the answer to the determinative question: Was the state court hearing adequate?

Under long standing Supreme Court precedent, where, as here, a petitioner has alleged facts which would entitle him to habeas relief, *see* Part IIA, *supra*, a federal habeas

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[18]*Smith v. Brewer, supra*, 444 F. Supp. 482; *but see Tobias v. Smith*, 468 F. Supp 1287 (W.D.N.Y. 1979) (evidentiary hearing ordered on habeas petition's claim that foreman told jury to disregard identification issue because all blacks look alike and to credit white victim's testimony over that of the black defendant).

[19]*E.G., United States v. Winters*, 434 F. Supp. 1181 (N.D. Ind. 1977) (Sharp, J.), *aff'd*, 582 F.2d 1152 (7th Cir.), *cert. denied*, 439 U.S. 936 (1978) (Jurors questioned by trial court); *see also* cases cited in notes 14, 15, 16, and 17 *supra*.

court must conduct an evidentiary hearing under certain circumstances. Specifically, a hearing is required if: (1) the merits of the factual dispute were not resolved in the state court proceedings; (2) the state court did not afford the petitioner a full and fair hearing; or (3) the material facts were not adequately developed in the state court proceedings. *Townsend v. Sain*, 372 U.S. 293, 313 (1963).

In this case, a hearing is mandatory under at least two of these criteria. Duckworth admits that "the trial court did not make a specific finding as a result of the post-conviction hearing..." The Indiana Supreme Court's opinion may be construed as containing such a finding. *See* 381 N.E.2d at 1241. However, we need not decide if it does and, if so, whether it makes an evidentiary hearing unnecessary because such a hearing clearly is required under the other two criteria.

The record reveals that the state court did not provide Owen with a full and fair hearing. As discussed above, the most crucial witness, Tolley, was excused from the post-conviction hearing and a request to depose her ultimately was denied. Only one of the jurors testified at the hearing. It is not clear whether Owen intended to call others. However, after hearing only two witnesses, the trial court made it obvious that attempts to call additional witnesses would be futile, stating: "I am not going to let this continue.... If this is all right the Supreme Court of Indiana is going to have to say that it is." The Supreme Court of Indiana condoned the trial court's foreclosure of further proof. 381 N.E.2d at 1241.

Because of that foreclosure, as discussed more fully above, the material facts were not developed adequately in the state court proceeding. For example, on the current record, it cannot be determined when Tolley told the other jurors about receiving the threat. Yarger's testimony indicates that it was before the deliberations, while Tolley's responses to McManama's questions indicate the opposite. Also, we cannot tell from the state court record whether

Tolley attributed the telephone call to Owen or someone connected with him when speaking about it with the other jurors. These matters are crucial. It is likely that they will be determinative of the existence or absence of prejudice in this case.

To summarize, our examination of the record convinces us: that Owen's allegations are made in good faith; that he may be able to prove facts that would entitle him to habeas relief through permissible means; and that the state court post-conviction hearing provided Owen with an inadequate opportunity to litigate this claim. Consequently, a remand for an evidentiary hearing is required.

The judgment is VACATED and the case REMANDED for further proceedings consistent with this order.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
(Submitted: November 3, 1980)
November 7, 1980.

Before
Hon. WALTER J. CUMMINS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

RICHARD LEE OWEN, II, *Petitioner-Appellant,*	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. S-79-98 Allen Sharp, *Judge.*
No. 79-2546 vs.	)	
JACK DUCKWORTH, Warden, *Respondent-Appellee.*	)	

ORDER

The petitioner-appellant, Richard Lee Owen II, appeals from the denial of his *pro se* petition for a writ of habeas corpus without a hearing.[1] In the district court, Owen urged seven grounds for relief. However, only two of these are pursued on appeal. Owen now claims only: (1) that he was denied a fair trial because of juror misconduct; and (2) that in-court identification testimony should have been suppressed because it was tainted by impermissibly suggestive, pre-trial identification procedures and publicity.

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[1]Although Owen appeared *pro se* below, in this appeal he is represented ably by a professor at, and four students of, the Valparaiso University School of Law.

Pursuant to the agreement of the parties, this case was submitted for decision without oral argument under Fed.R.App. P. 34(a) and Circuit Rule 14(f). Upon examining the briefs and the record, we have decided that oral argument shall be heard regarding the first ground for relief set forth above.[2] The remaining claim is submitted according to the parties' agreement.

I.

Owen was convicted after a lengthy jury trial of committing a felony while armed with a dangerous or deadly weapon and sentenced to a term of imprisonment of twenty-seven years, which he currently is serving at the Indiana State Prison in Michigan City, Indiana. The charges against him arose out of the shooting of Maurice Woods, a South Bend, Indiana policeman who was shot by the driver of an automobile of which he had made an investigatory stop. Throughout the state court proceedings, Owen represented himself, assisted by lay assistant David Spencer and Public Defender Anthony V. Luber. With Owen again appearing *pro se*, the Indiana Supreme Court affirmed his conviction without oral argument, rejecting both of the claims at issue in this appeal. *Owen v. State*, 381 N.E.2d 1235 (1978).

Having exhausted his available state court remedies, Owen filed the instant petition for a writ of habeas corpus. The district court received and examined the entire state court record but denied Owen's request for an evidentiary hearing. The petition was denied on December 6, 1979. The district court granted a certificate of probable cause and a timely notice of appeal was filed.

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[2]The date and time allocations for argument shall be set according to the rules and regular procedures of the court. Thus argument will not necessarily be heard by this panel.

II.

Owen contends that in-court identification testimony should have been suppressed because it was tainted by impermissibly suggestive pre-trial identification procedures and publicity. The present test for the admissibility of in-court identifications where pre-trial identification procedures were employed is set forth in *Stovall v. Denno*, 388 U.S. 293, 320 (1967). If under the "totality of the circumstances" a pre-trial confrontation "was so unnecessarily suggestive and condusive to irreparable misidentification" as to deny due process, then a habeas petitioner is entitled to his requested relief.

To apply this test, a three-step analysis is employed. First, the pre-trial procedure is examined to determine if it was suggestive. If it was, the reviewing court considers whether any unusual or exigent circumstances justified its use. Finally, the court determines whether the identification was reliable. *See e.g., United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 402-03 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975).

Reliability is the linchpin. The factors to be weighed in determining reliability include: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of any prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and the confrontation. Against these factors must be weighed "the corrupting effect of the suggestive identification itself." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977): *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Applying the foregoing analysis to the facts of this case, we conclude that habeas relief was properly denied on this claim.

Owen challenges a pre-trial videotaped line-up which was viewed by three witnesses (including the victim) who

identified Owen at trial.[3] Owen claims that the line-up was unnecessarily suggestive because he "was the only one wearing glasses which was asked to take them off, only two of the six had glass on at all." In addition, Owen alleges that all of the participants in the line-up, except him, had tatoos to which they pointed.[4] These factors did not render the line-up unduly suggestive.

Moreover, even if we agreed with Owen that the line-up was impermissibly suggestive, habeas relief still would not be warranted on this claim. An extensive discussion is unnecessary. To us the record reveals that the three witnesses' identifications bore sufficient indicia reliability.[5] The inconsistencies in the witnesses' previous descriptions and the other matters upon which Owen relies were

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[3]These witnesses also saw photographs of Owen which were in the newspaper and which were shown to them by police during their investigation. However, Owen does not directly challenge the suggestiveness of these procedures, although he does claim that the cumulative effect of these viewings tainted the witnesses' in-court identifications. As discussed in the text, we find that the witnesses' identifications were sufficiently reliable to satisfy the requirements of due process.

[4]This argument was properly presented below in Owen's Memorandum. *See Montes v. Jenkins*, 581 F.2d 609 (7th Cir. 1978), *appeal after remand*, No. 79-1983 (July 25, 1980).

In the state court Owen also argued that, as counsel for himself, he should have been present when the videotape was shown. This argument is alluded to but not stressed here. On this point, Duckworth has the better argument. It would have been extremely suggestive for Owen to have been present when the videotape was shown. The procedures employed here were an acceptable accomodation of Owen's right to counsel, *see United States v. Wade*, 388 U.S. 218 (1967), and the practicalities of *pro se* representation.

[5]This is especially true of the crucial identification witness, Officer Woods, the victim. He first glimpsed the criminal at night in a restaurant whose manager had called the police because a male customer was acting suspiciously. The customer fled upon the arrival of Officer Woods, who followed the man's car closely, losing sight of it only momentarily, and eventually stopped it. Woods asked for the man's driver's license. At trial, he recalled that the license bore Owen's

properly left as matters of weight to be by the jury.[6] *See Lewis v. United States*, 417 F.2d 755, 760 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970).

IT IS ORDERED that oral argument be set on the juror misconduct claim.

Insofar as the district court denied habeas relief upon Owen's identification claim, the judgment is AFFIRMED.

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name. The two were together for approximately two minutes while Woods searched the car. They stood only three feet apart with Woods holding a flashlight pointed towards the driver when Woods noticed that the man was holding a gun. Thereafter, the man shot Woods three times in the elbow and chest. At trial, Woods was certain that Owen was the man who shot him, recognizing Owen's voice as well as his face.

[6]The slight differences in the witnesses' descriptions and their variance from Owen's appearance at trial probably are attributable to the fact that the criminal was disguised with make-up, a wig and padding. Nevertheless, each of the identification witnesses was quite sure that Owen was the man they saw.

United States District Court

NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

RICHARD LEE OWEN, II, *Petitioner*	)	
v.	)	No. S 79-98
JACK DUCKWORTH, Warden, *Respondent*	)	

MEMORANDUM AND ORDER

Petitioner, Richard Lee Owen II, is a state prisoner confined in the Indiana State Prison at Michigan City, Indiana. On October 15, 1976, Owen was convicted of attempt to commit a felony while armed in the St. Joseph Circuit Court, the Honorable John Montgomery, judge presiding, for which he was sentenced to a determinate term of 27 years imprisonment. Thereafter, a direct appeal was taken to the Indiana Supreme Court which unanimously affirmed the judgment of the trial court in a published opinion, *Owen v. State of Indiana*, ___ Ind. ___, 381 N.E. 2d 1235 (1978). Petitioner filed a petition for rehearing which was denied on March 13, 1979. The full state record of proceedings was filed with this Court on June 19, 1979, and has been carefully and fully examined.

Owen alleges that he was denied a fair trial because the jury was not sequestered and one of the jurors was threatened during the trial, because the state trial court did not grant his motion to dismiss either the charge of assault and battery with intent to kill or attempting to

commit a felony while armed, that the state did not prove he was over the age of sixteen at the time the crime was committed, that witness identification was "tainted" by a suggestive lineup, that he was denied the right to present evidence to the jury concerning sentencing, and that he was denied a fair hearing on appeal because he proceeded *pro se*. Each of the issues in this petition were presented to the Indiana Supreme Court on appeal except the question of whether he was denied a fair hearing on appeal because of his *pro se* status. That proposition was asserted in the memorandum in support of Owen's petition for rehearing.

Petitioner contends that he was denied a fair trial because his request for sequestering the jury was denied. Jury sequestration is not fundamental or a constitutionally guaranteed right. *Young v. State, of Alabama*, 443 F. 2d 854 (5th Cir. 1971, *cert. den.*, 92 S. Ct. 1202, 405 U.S. 970, 31 L. Ed. 2d 251 (1971). Failure to sequester a jury during a trial does not warrant habeas corpus relief absent any showing of prejudice. *Shrader v. Riddle*, 401 F. Supp. 1345 (D.C. Va. 1975); *U.S. ex rel. Jacques v. Hilton*, 423 F. Supp. 895 (D.C. N.J. 1976). No such showing of prejudice is found by this Court after a review of the record.

The petitioner contends that the jury should have been sequestered because of the publicity in the case. He made this motion at the beginning of the trial and renewed the motion at the beginning of each day's proceedings. However, where, as here the trial judge voir dired the jurors every morning concerning the question of publicity and the jurors denied reading, seeing, or hearing any publicity concerning the trial, there is no showing of prejudice and no constitutional error in not sequestering the jury.

The state court trial judge firmly and clearly admonished the jurors that they were to obstain from reading or listening to anything about the trial or from talking with anyone about it. Nowhere in the record or in the petitioner's allegations can it be found that a juror

disobeyed this admonition. Petitioner made a pretrial motion of sequester the jury. Petitioner submitted to the court newspaper clippings which he contended were prejudicial. He did not indicate to the court that such articles were either inaccurate or unfair.

The threshold question facing a court when confronted with such a claim of in-trial prejudicial publicity is whether the publicity rises to the level of substantial prejudicial material. *United States v. Pomponio*, 517 F. 2d 460 (4th Cir. 1975), *cert. den.*, 423 U.S. 1013, 96 S. Ct. 448, 46 L. Ed. 2d 386 (1976). This question is "committed to the trial court's discretion." *Gordon v. United States*, 438 F. 2d 858 (5th Cir. 1971), *cert. den.*, 404 U.S. 838, 92 S. Ct. 63, 30 L. Ed. 2d 56 (1971). This Court, in reviewing the trial court's determination of such an issue, must make an independent evaluation of the circumstances at trial and must give deference to the state trial court's informed discretion. Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); *United States v. Anderson*, 165 U.S. App. D.C. 390, 509 F. 2d 312 (1974), *cert. den.* 420 U.S. 991, 95 S. Ct. 1427, 43 L. Ed. 2d 672 (1975). After a review of the pertinent portions of this record, this Court agrees with the state trial court's determination that the press clippings could create a degree of prejudice harmful to the petitioner if read by the jurors. Moreover, this Court finds that the state trial judge acted with the utmost care in performing his duty to insure a fair trial. The state court trial judge recognized his responsibility to further investigate any adverse effect in-trial publicity may have had on the jurors. The jurors were questioned at the beginning of each trial day whether they had read or listened to any accounts of the trial outside the court. Such an investigation is necessary once prejudice is determined to be a possibility. *United States v. Thomas*, 463 F. 2d 1061 (7th Cir. 1972).

The trial court judge followed the procedure outlined in this circuit when a claim of prejudicial in-trial publicity is made. *Margoles v. United States*, 407 F. 2d 727 (7th Cir.

1969), *cert. den.*, 396 U.S. 833, 90 S. Ct. 89, 24 L. Ed. 2d 84 (1969). An inquiry was made each day as to whether any juror had read or heard the prejudicial publicity. On all the days of trial, but one, a collective negative answer was given to the court's inquiry. On those days, the trial court was not required to proceed further with any questioning. *Margoles, supra.* On one day during the trial, a single juror responded to the court's inquiry stating she saw a newspaper headline concerning the case the previous evening but that she did not read any of the paper. The trial judge, at that time, excused all the jurors but the woman who saw the headline and individually examined her outside the prescence of the other jurors concerning any possible prejudice. After this full and complete examination the trial judge found no prejudicial effect as a result of reading the headline. This Court agrees both with the procedure utilized by the trial court and with its finding that no prejudice existed. The possibility of prejudice from reading a single headline was too remote to require anything more than the admonition which was firmly and repeatedly given by the trial court. *United States v. Jones*, 542 F. 2d 186 (1976). Therefore, having made no showing of any prejudice, this court finds that the state trial court acted within its discretion in refusing to sequester the jury and that it did so without error of any constitutional magnitude. Petitioner's claim on this issue is denied.

Petitioner further contends that one of the jurors received a "threatening" phone call and that at least some of the other jurors were advised of the call. The trial judge was informed of the call the day after it occurred and he spoke with the juror who advised him that she was capable of reaching a fair and impartial verdict based on the evidence. Petitioner contends there was no juror misconduct because the juror who received the call is alleged to have told other jurors of the call. Juror misconduct has frequently been found not to constitute a constitutional defect warranting habeas relief. *Hinojos v.*

Black, 462 F. 2d 621 (9th Cir. 1972), *cert. den.*, 93 S. Ct. 943, 409 U.S. 1126, 35 L. Ed. 2d 258 (1972). Whether there was juror misconduct or improper influence is a fact to be determined by the trial judge, and federal district courts, in habeas proceedings, will not generally review a trial court's alleged abuse of discretion, *Wade v. Jones*, 192 F. Supp. 333 (W.D. Ky. 1961). No state court found a basis for granting a new trial under state law. The Indiana Supreme Court found that juror misconduct had not been established conclusively. *Owen v. State*, supra, at 1241. After an extensive and careful review of both the in court and in chambers record, this court finds no constitutional error in the state court ruling. The state court trial judge conducted a post-trial hearing on the juror misconduct issue and found no error. That judge was careful not to invade the province of the jury. No error of any constitutional magnitude can be found by this Court. Moreover, there has been made no showing by petitioner of any fraudulent concealment of bias, nor any other exceptional circumstances that would justify deviation from the rule that affidavits of jurors cannot be used to impeach their verdict. *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915); *Bateman v. Donovan*, 131 F. 2d 759 (9th Cir. 1942).

The petitioner, Richard Lee Owen II, has requested that this Court order an evidentiary hearing at which some or all of the members of the state court jury which convicted him of attempt to commit a felony while armed may be questioned. The exact need for such a procedure as it pertains to jury members has not been made explicit by plaintiff. Neither has the plaintiff been explicit as to the proposed areas of evidentiary inquiry. Neither does the plaintiff specify whether he wants to question some or all members of said jury.

The state court jury was convened by the St. Joseph Circuit Court on October 4, 1976, and was discharged by the judge of that court on October 15, 1976. Three years

have elapsed and this Court has no way of knowing how many of that jury are now available to testify.

There are a number of theoretical as well as practical impediments to the plaintiff's request.

First, there is the general proposition that the testimony of a jury may not be used to impeach a verdict. This rule has long been a part of the law of Indiana. *Spannuth v. Cleveland* C.C. & St. L. Ry. Co., 196 Ind. 379, 148 N.E. 410 (1925); *Waltz v. Noble*, 73 Ind. App. 608, 123 N.E. 218 (1919); *Weil v. Stone*, 33 Ind. App. 112, 69 N.E. 968 (1904); *Jessop v. Werner Transp. Co.*, 147 Ind. App. 408, 261 N.E. 2d 598 (1970); *Anderson v. Taylor*, 154 Ind. App. 217, 289 N.E. 2d 789 (1972); *Brunson's Estate v. White*, 157 Ind. App. 211, 299 N.E. 2d 186 (1973). It has been applied in criminal cases in Indiana. *Turczi v. State*, 261 Ind. 273, 301 N.E. 2d 752 (1973); *Laine v. State*, 154 Ind. App. 81, 289 N.E. 2d 141 (1976); *Critchlow v. State*, 264 Ind. 458, 346 N.E. 2d 591 (1976). It is also generally followed in the United States Court. *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915). See also, *U.S. v. Dioguardi*, 492 F. 2d 70 (2d Cir. 1974), *cert. den.*, 419 U.S. 873; and *Miller v. U.S.*, 403 F. 2d 77 (2d Cir. 1967). In the United States Courts these basic ideas have been embodied in Rule 606(b) of the Federal Rules of Evidence. Under Rule 606(b) a jury member may testify or submit an affidavit as to the existence of any extraneous prejudical influence but not as to whether or not that influence operated upon him or another juror. Under all these authorities the petitioner cannot now call jurors to impeach the verdict resulting in his state conviction.

Second, there has been an ongoing concern and practice in this Court in regard to *any* post-verdict exparte interrogation of jurors. See *U.S. v. Winters*, 434 F. Supp. 1181 (N.D. Ind. 1977), affirmed 582 F. 2d 1162 (7th Cir. 1978). *Winters* and the authorities cited reflect the very narrow confines of such post-verdict interrogation by the same court that originally convened the jury. The strict

limits established by this Court in *Winters* and affirmed on appeal are both theoretically sound and practically necessary. One of the value concerns is the opportunity for and the prevention of post-verdict harrasment of jurors.

Third, this Court did not convene the jury in question but same was convened by a circuit court of general jurisdiction in the State of Indiana whose judge has had long experience in the area of criminal litigation both on and off the bench. Under 42 U.S.C. 2254 there must be basic respect for the proper procedural functioning of the state courts. Indeed, the same is constitutionally mandated. There is very little authority which mandates that a United States District Court order the members of a state court jury who convicted a defendant who has now become a petitioner in a claim under 42 U.S.C. 2254 to appear and testify in such proceeding. This Court is aware of *Tobias v. Smith*, 468 F. Supp. 1287 (W.D. N.Y. 1979). This single authority does not mandate the action here requested. With all deference to the author thereof the record in this case simply does not require the procedure there adopted. At least, the better procedure would be for the United States District Court to remand the case to the state court that originally convened the jury in question and thereafter to confer on that state court authority to conduct any necessary interogation of such state court jurors. However, the record in this case contains nothing to indicate the need to remand this case to the St. Joseph Circuit Court for such a procedure.

Fourth, the jury interrogation procedure requested cannot be used to simply relitigate issues already fully and correctly litigated in the state courts. In this case the selection, composition and conduct of the jury in question has been extensively litigated in the courts of the State of Indiana. The final decision of the Supreme Court of Indiana on these issues is correct and should not be disturbed in this proceeding. A fuller statement on these issues appears elsewhere in this memorandum.

In this regard, paragraph 12A Ground One of the petitioner's complaint states:

> "The defendant was denied a fair trial since one of the jurors in the trial was threatened and revealed said threat to the other jurors during the deliberation against the direct order of the trial judge not to tell anyone about the threat.
>
> FACTS: During the first week of a two week jury trial one of the jurors, a woman 68 years old, received a threating (sic) phone call at her home. She called the police and an in-camera session was held the next morning. The defendant moved for a mistrial, denied, the judge told the juror not to discuss the threat with anyone on the jury. After the trial was over the defendant asked the public defendant's investigator to question the other jurors to see whether they had been threatened. The investigator reported and testified at the Motion to Correct Errors Hearing that all of the jurors knew about the threat and in fact admitted that Mrs. Tolley, threatened juror, had told them during deliberation. When Mrs. Tolley was questioned she admitted doing this and in fact said she told specifically the two jurors who were holding out. The jury in this case was out some twenty hours."

These allegations have all the earmarks of an attempt to relitigate *in an evidentiary hearing* these jury issues. These issues can be and are presented to this Court fully in the entire state record which is present and has been carefully examined. Specifically these issues were thoroughly gone into as shown at pages 2266-2299 of the state transcript in proceedings held on April 26, 1977.

Fifth, and finally, this requested procedure cannot and must not be used as a fishing expedition in an attempt to discover some kind of vaguely alleged jury misconduct.

Before this plaintiff or any plaintiff similarly situated can justify even preliminary consideration for such an extraordinary post-verdict juror interrogation there must be considerable specificity, preferrably by affidavits or

some other form of sworn testimony as to the exact nature of any alleged juror misconduct and the precise nature of the inquiry requested. Such a plaintiff must shoulder a very heavy burden given all of the five categories of considerations here outlined. After the plaintiff has sustained the initial burden here described the United States District Court must then determine the procedure to be followed including the decision to remand to the state court or to conduct such hearing. The United States District Court should also carefully outline the procedures to be followed in such inquiry.

In this case this plaintiff has in no way met the initial burden which could trigger a post-verdict jury interrogation. In fact, the plaintiff has not even come close to meeting such burden. The record in no way requires such an inquiry. It is doubtful if the present state of the record would even *permit* such an inquiry.

Weighing all of the factors here discussed the plaintiff's request for post-verdict juror interrogation is now in all things DENIED.

Petitioner alleges constitutional error because he was charged with assault and battery with intent to kill and attempting to commit a felony while armed. At trial petitioner contended that assault and battery with intent to kill was a lesser included offense of attempting to commit a felony while armed and that, therefore, one of the charges should be dropped. He was acquitted of assault and battery with intent to kill and convicted of attempting to commit a felony while armed.

The procedure followed by the prosecution here was specifically allowed by state law. *Carter v. State*, ___ Ind. ___, 361 N.E. 2d 145 (1977); IC 35-12-1-1. The Indiana Supreme Court found that even assuming arguendo that assault and battery with intent to kill was a lesser included offense, that there was no harm to the petitioner because he was convicted of only the greater offense. *Owen v. State*, 381

N.E. 2d at 1241. Under Indiana State law, acquittal of an alleged lesser offense does not require acquittal on the alleged greater offense when they are tried together. *Webb v. State*, 284 N.D. 2d 812 (1972). Thus, the Indiana Supreme Court has reviewed this question and found that as a matter of state law there was no error or harm to the petitioner. Interpretation of state law is a question for the state courts. *Silva v. Cox*, 351 F. 2d 61 (10th Cir. 1965); *Ratley v. Crouse*, 365 F. 2d 321 (5th Cir. 1966). There is nothing in this state procedure which is inconsistent with the fundamental principales of liberty and justice and petitioner was not harmed by the trial court decision on this question.

Petitioner next contends that one of the elements of commission of a felony while armed with a deadly weapon was that he be over the age of sixteen and that "no evidence was presented during the trial which would prove this element." (petition at 5a). This Court finds petitioner's contention to be totally without merit. Petitioner, is in fact, contending that the evidence presented at this criminal trial was insufficient to obtain a conviction. The critical inquiry upon review for this Court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, ___ U.S. ___, 99 S. Ct. 2781, 2789, ___ L. Ed. 2d ___ (1979). After a complete review of the record on this matter, this Court finds that any rational trier of fact could indeed have found this age element of the crime beyond a reasonable doubt.

Petitioner's testimony established for the trial court and jury that Owen was over the age of sixteen at the time he shot officer Woods:

DIRECT EXAMINATION BY THE DEFENDANT

Q. Would you please give your full name and spell your last name?

A. Richard Lee Owen, II. O-w-e-n.

Q. Have you have been convicted of a felony?

A. Yes. When I was seventeen years old I stole a car, took it across the state line, and did time in federal prison because of it. I've also been convicted of attempted escape. (Tr 1997)[1]

Q. Now, this Tony Genovese, where did you first meet him?

A. At the Federal Penitentiary in Petersburg, Virginia.

Q. What year would that have been?

A. 1965.

* * * * * *

Q. How old was Tony in 1965?

A. He was approximately about two years younger than I, so I would say approximately eighteen. (Tr. 2012-2013)

This testimony, by the petitioner himself, establishes that he was over the age of sixteen in 1976. Thus, this Court finds the petitioner's testimony, before the jury, establishes that he was well over the age of sixteen on July 10, 1976, when he shot officer Woods.

Petitioner contends that the in court identification made by three witnesses had been tainted by a suggestive lineup. Owen contends that the lineup was suggestive because he was the only one who was wearing a suit and because only two of the six persons were wearing glasses, and he was the only one asked to take his glasses off. A video tape of the lineup was shown to prospective witnesses. The suspect who shot officer Woods was wearing a black wig, had used makeup on his face, and was not wearing glasses at the time he was observed by the witnesses other than Officer Woods.

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[1]Page numbers correspond with those found at the bottom of the page in the center.

At trial the petitioner argued that the identification procedure was tainted without specifically supporting that position. The Indiana Supreme Court found that:

> "Appellant, at trial, merely argued in conclusory fashion that the procedure was 'tainted.' No evidence was presented to support any reason for suppression of the testimony of the identifying witnesses....The errors alleged here are thus wholly specious." 381 N.E. 2d at 1240.

On the issue of whether eyewitness identification at the trial was tainted by pretrial identification procedures, this Court may make an independent finding on the basis of the entire record when the record is adequate for that purpose. *U.S. ex rel Albertini v. Butler*, 391 F. Supp. 213 (D.C.N.Y. 1975). However, even assuming arguendo, that the procedures were tainted, Owen would not be entitled to habeas relief because the in court identification was independent of, and not tainted by the lineup. *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 1976[1]; *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *United States ex rel Tyrrell v. Jeffes*, 420 F. Supp. 256 (E.D. Pa. 1976). Under the guidelines set forth in *Wong Sun* there was an independent basis for the in court identification. Review of the evidence establishes that each of the witnesses had the opportunity to observe the suspect at close range, at least two of the three conversed with the suspect, and each of the witnesses was able to identify Owen as the suspect based on features not disguised by the wig and makeup.

Given the basis for identification by these witnesses there was sufficient independent basis for their testimony even assuming arguendo that the lineup was tainted.

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[1]The requirement in *Wade* that counsel be present at the lineup would not apply here where the defendant had waived counsel and was proceeding *pro se*. It would have been a very suggestive procedure if the defendant had been present when the video tape of the lineup had been shown to the witnesses.

Petitioner also contends that he was denied a fair trial because he was denied the opportunity to present evidence after the verdict concerning sentencing. He contends that he should have been allowed to present such evidence because the jury was responsible for setting the sentence and that in a bench trial the trial judge would have considered a presentence report prior to sentencing.

A presentence report is prepared by a probation officer, IC 35-50-1A-9 (formally IC 35-8-1A-9), so that even in the case of a bench trial the defendant himself does not have the right to present evidence on sentencing. The Indiana courts have held that defendants have no inherent right to have a presentence report considered before sentencing. This is a privilege which the legislature granted defendants tried before a judge and which has been necessarily and properly denied defendants tried before a jury because of differences in procedure which exist between jury and bench trials. See *Pulliam v. State*, ____ Ind. ____, 345 N.E. 2d 229 at 241-243 (1976).

There is no constitutional right for a defendant in a criminal trial to present evidence on sentencing and there is nothing constitutionally infirm in Indiana's rule concerning use of presentence reports only where there was a bench trial.

Petitioner's last contention is that he did not receive fair hearing on appeal because he had exercised his constitutional right to proceed *pro se*. The only evidence he asserts in support of this proposition is that the Indiana Supreme Court referred to his *pro se* status in its opinion.

A review of that opinion establishes that the Indiana Supreme Court took this occasion to reaffirm their practice of accepting pro se appeals and the reasons why they have chosen to exercise discretion in doing so. *Owen v. State*, 381 N.E. 2d at 1238, 1239. There is absolutely nothing in this opinion which indicates that petitioner did not receive a fair hearing on appeal because of his pro se status.

Furthermore, this petitioner, while proceeding pro se, recently achieved a reversal of another criminal conviction in the Indiana Court of Appeals. *See Owen v. State*, ____ Ind.App. ____, 388 N.E. 2d 292 (1979). This decision indicates that pro se appellants, including Owen, are not deprived of a fair hearing in Indiana appellate courts.

A closing word should be said in compliment to the manner in which the Honorable John W. Montgomery, Judge, St. Joseph Circuit Court, handled this most difficult case. He did so at all times with the utmost care and strick the precisely correct balance of firmness and fairness. No constitutional error was committed by the Indiana State Judiciary in this case that requires this Court to grant the requested writ. The writ is therefore DENIED.

All relief requested under 28 U.S.C. 2254 is now DENIED. Enter December 6, 1979.

/s/ Allen Sharp
JUDGE, UNITED STATES
DISTRICT COURT

cc: R. Owen
K. Hilles
order book

United States District Court

FOR THE
NORTHERN DISTRICT OF INDIANA

CIVIL ACTION FILE NO. S79-98

RICHARD LEE OWEN, II,	)	
	)	
VS.	)	JUDGMENT
	)	

JACK DUCKWORTH, *Warden*

This action came on for (hearing) before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Petitioner take nothing by his complaint and this case is dismissed.

Dated at South Bend, Indiana, this 6th day of December, 1979.

RICHARD E. TIMMONS
Clerk of Court

BY /s/ Terese M. Hinkle
Deputy Clerk